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No. 71-1224

In the
Supreme Court of the United States
OCTOBER TERM, 1971

ALFRED EDWARD McGEE,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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v.

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Alfred Edward McGee, prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Seventh Circuit entered on January 11, 1972, in the above entitled cause.

CITATION TO THE OPINION BELOW.

The opinion of the United States Court of Appeals for the Seventh Circuit, printed in the Appendix attached hereto, pages 1a-9a, is unreported at the present.

JURISDICTION

The opinion and judgment of the Court of Appeals were filed and entered on January 11, 1972. Petition for a re-

hearing was denied February 28, 1972. This Petition for Writ of Certiorari will be timely filed on or before March 29, 1972.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTION PRESENTED

May a draft board constitutionally and lawfully increase its draft call and draft quota for the purpose of drafting a person who would not be included in the call without the increase?

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment V of the United States Constitution which provides in pertinent part:

> "No person shall . . . be deprived of life, liberty or property without due process of law; . . ."

STATUTES INVOLVED

50 App. U.S.C. Section 455 provides in material part:

> Section 455(a) (1) "The selection of persons for training and service under Section 4 shall be made in an impartial manner, under such rules and regulations as the President may prescribe, from the persons who are liable for such training and service and who at the time of selection are registered and classified, but not deferred or exempted: . . ."
>
> Section 455(b) Quotas.—"Quotas of men to be inducted for training and service under this title shall be determined for each State, territory, possession, and the District of Columbia and for subdivisions thereof, on the basis of the actual number of men in the several States, Territories, possessions, and the District of Columbia and for the subdivisions thereof, who are

liable for such training and service but who are not deferred after classification, except that credits shall be given in fixing such quotas for residents of such subdivisions who are in the Armed Forces on the date fixed for determining such quotas. After such quotas are fixed, credits shall be given in filling such quotas for residents for such subdivision who subsequently become members of such forces . . ."

SELECTIVE SERVICE REGULATIONS INVOLVED

32 C.F.R. Part 1631, Quotas and Calls as they appeared during May and June of 1969 are set forth in the Appendix, pages 10a through 18a, for the convenience of the Court.

STATEMENT OF THE CASE

The petitioner, Alfred Edward McGee, was prosecuted for refusal to submit to induction into the Armed Forces. 50 App. U.S.C. §462. The indictment charged that the petitioner refused induction on June 11, 1969. After a jury verdict of guilty, the District Court sentenced the petitioner to three years in a penitentiary.

At trial, the government introduced a certified copy of the petitioner's Selective Service file in evidence. The file shows that petitioner was deferred as a student from January 14, 1964 until May 28, 1968 (with a brief interruption in the deferment from December 1967 to February 1968) (Government Exhibit 61 p. 8). On May 28, 1968, he was placed in class I-A and in September of 1968 was granted a personal appearance (Government Exhibit 61 p. 8). At that time, the board extended the following in its minutes:

"9-17-68 defer action until October '68 Vote 3 yes, 0 no."

Without placing him in class I-A following the personal appearance, the board ordered the petitioner to report for

induction on January 28, 1969. The petitioner refused induction. (Government Exhibit 61 p. 7) The deputy State Director for the State of Illinois directed the local board to cancel that induction order and to reopen the petitioner's classification (Government Exhibit 34). The Board complied with the direction from Illinois headquarters. The petitioner asked for the assistance of the Government Appeal agent (Government Exhibit 38). At an interview with the Government Appeal Agent he discussed the petitioner's possible claims for a medical deferment or a deferment for hardship to dependents. The appeal agent: "Advised registrant of elements of I-Y and III-A and that he should give the board evidence of dependency and extreme hardship." (Government Exhibit 41) The petitioner followed the appeal agent's advice and presented a claim for a III-A deferment. The local board classified him I-A on May 13, 1969. Two weeks later, the appeal board denied petitioner's hardship claim. On May 27, 1969, the local board mailed the petitioner notice that his appeal had been denied. (Government Exhibit 61 p. 7). On the same day the local board wrote the following letter to the Illinois State Director:

> "RE: MC GEE, ALFRED EDWARD
> SS NO. 11-79-43-493
> . . .
> DEAR SIR:
> LOCAL BOARD NO. 79 IS REQUESTING YOUR AUTHORITY TO INCREASE THE JUNE 11TH INDUCTION CALL SO THAT THE ABOVE NAMED REGISTRANT MAY BE INCLUDED. HE WILL BE 26 YEARS OF AGE ON AUGUST 10, 1969." (Government Exhibit 52).

The board issued an induction order the following day (Government Exhibit 55) ordering the petitioner to report for induction on June 11, 1969. The defendant reported

as ordered but did not complete certain papers at the induction center. The indictment charged that the petitioner "refused to submit to induction . . . in that he refused to co-operate in the induction processing." The jury returned a verdict of guilty.

In his motion for judgment of acquittal, the petitioner challenged his induction order on the grounds that petitioner was called out of order and that it was irregular and unlawful for the board to increase their call by one so that they could include McGee in the call. Transcript p. 189. The District Court denied the motion for judgment of acquittal and imposed a penitentiary sentence of three years. On appeal to the Seventh Circuit Court of Appeals the defendant argued that there is no provision in the law authorizing increase of an induction call so an individual can be called because he is approaching 26 years of age (Defendant's Brief p. 13 and Petition for Rehearing). The Seventh Circuit Court of Appeals relied on a presumption of regularity, cited some order of call cases and affirmed the conviction. Petition for rehearing was denied February 28, 1972. On March 1, 1972, the Court of Appeals stayed its mandate pursuant to Rule 41(b) of the Federal Rules of Appellate procedure.

REASONS FOR GRANTING THE WRIT

> "We deal with conduct of a local board that is basically lawless. It is no different in constitutional implication from a case where induction of an ordained minister or other clearly expert person is ordered (a) to retaliate against the person because of his political views or (b) to bear down on him for his religious views or his racial attitudes or (c) to get him out of town so that amorous interests of a board member might be better served." *Oestereich* v. *Selective Service Board No. 11*, 393 U.S. 233, 237 (1968)

The decision of the Court of Appeals ignores the principles and spirit of this Court's holdings in *Oestereich* v. *Selective Service Board No. 11*, 393 U.S. 233 (1968) and *Gutknecht* v. *United States*, 396 U.S. 295 (1970).

In *Gutknecht*, the Court recognized that singling the petitioner out for accelerated induction was lawless. 396 U.S. 295, 299, 304-305. To justify Gutknecht's induction, the Government relied on the delinquency regulations; here no authority whatsoever justifies drafting the petitioner before the next regular draft call. Without the board's letter to the State Director (Government Exhibit 52), the petitioner would not have been included in the June 11, 1969 draft call: the letter itself requests ". . . authority to increase the June 11th induction call *so that* the above *named* registrant may be included." (emphasis added) (Government's Exhibit 52) Implicit in the request are (1) the June 11th call was already filled, (2) the local board lacked authority to increase the call or create a vacancy in it, and (3) by asking to add the petitioner to the June 11th call rather than waiting for the next regular call, the local board sought to accelerate the petitioner's induction.

The board explained its extraordinary request: "He will be 26 years of age on August 10, 1969." (Government Exhibit 52). 32 C.F.R. §1631.7 provides that men more than 26 years old are called after other registrants. Such men have not been subject to induction in recent history. Even so, the statute and the regulations do not authorize a local board or the State Director to increase a particular local board's fair share of the men to be inducted because some registrant at the local board will be too old to be drafted unless the board gets him now.

When Congress has established a statutory scheme for the allocation of a national draft call among local boards throughout the nation, neither a single board nor a State Director may nonetheless add a registrant to a draft call for reasons not material to the setting of draft quotas. Section 5(b) of the Military Selective Service Act, 50 App. U.S.C. §455(b) requires the National draft call to be allocated and determined for each State and local board according to the number of men it has "liable for . . . service but who are not deferred" and the number of men from it "in the Armed Forces." Significantly, the statute does not authorize the increase of quotas for a particular state or local board on the basis that some men in the jurisdiction may lawfully escape induction unless the draft calls are increased.

While Congress and the President may be free to choose new systems and new rules for allocating the calls and quotas among the local boards (Military Selective Service Act §5[d]), the courts must be prepared to enforce whatever laws govern quotas and calls to prevent the kind of arbitrariness and freewheeling absolutism which this court sought to check in *Oestereich* and *Gutknecht*. Regardless of the particular form of the regulations or statutes which

a board chooses to ignore when a board singles out a man for its own reasons or for carrying out a private vendetta, due process and the impartial administration of the Act (50 App. U.S.C. §455(a)) require the Court to act. The Court should void the order of a draft board which singles out registrant and deprives him of his liberty without regard for the laws which the board purports to administer.

The size of the draft call for the Nation is determined by the Secretary of Defense. Neither a single draft board nor a single State Director is authorized to increase the draft call.

The regulations authorized by the statute are embodied in part 1631 of the Selective Service regulations (32 C.F.R. and 1631.1 et seq.) The size of the draft call for the Nation is determined by the Secretary of Defense. Neither a single draft board nor a single State Director is authorized to increase the draft call.

The State Director of Selective Service is required to submit, periodically, reports of the total number of registrants in their States, the total number of men available for inductions and the number of men inducted and on active service in the Armed Forces. Regulations Section 1631.2. The information given in those reports provides the basis for allocating the quotas and calls among the States and among the local boards.

A draft call begins when the Secretary of Defense places a call or requisition with the Director of Selective Service, "for a specified number of men required for induction into Armed Forces." [Regulation 1631.4(a)] . . . "not less than 60 days prior to the period during which the delivery and introduction of such men are to be accomplished." Regulation 1631.4(b). When the Director of Selective Service

receives the call, he is required to allocate the call among the several States. Regulation 1631.5(a). The allocation is made pursuant to the standards established by the statute. Once the Director of Selective Service has set the quotas for the respective States, he issues a notice of call (Selective Service form 200) to the State Director of each State concerned. Regulation 1631.5(c). When the State Director for each State receives the call, he in turn allocates the call for his State among the local boards within his jurisdiction. He too is bound by the statute establishing the criterion for distributing the quotas among his local boards. When the State Director of Selective Service allocates the call among the boards in the State, he is required to issue to each local board a notice of call on local board (Selective Service form 201) directing the local board to select and deliver for induction "the *number* of men allocated to the board." Regulation 1631.6. The local board issues induction orders to fill their call "when a call is received." Regulation §1631.7.

One of the more than 4,000 local boards has no more authority to increase its own draft call by one man than it has to increase the draft call of the nation by 4,000 men.

The Court of Appeals brushed aside the petitioner's claim with a "presumption of regularity" (4a-5a). However, when we contrast the regulations which we must presume were followed with the record in this case, the lawless conduct of the board becomes manifest.

Giving the presumption of regularity its due weight, we should conclude that the National Director properly allocated the June draft call among the several States, that the State Director of Illinois properly allocated the draft call among the various local boards and that when the

local board received the notice of call it issued induction orders to the number of men required to fill the call. Regulation 1631.7.

We should further conclude that this procedure was regularly and properly completed before May 27, 1969 when the local board asked the State Director to increase its call so that it could induct defendant, McGee.

The presumption of regularity should lead the Court to conclude that the size of the draft call for local board 79 was properly and regularly set before May 27, 1969. Any increase in the size of a lawfully set call rebuts the presumption of regularity and requires the Government to show beyond a reasonable doubt that the increase in the call was lawful.

The letter on its face further rebuts the presumption of regularity. The local board asked to increase its call. (Government Exhibit 52). Yet, the regulations require the State Director to allocate the call upon the State among the local boards. Regulation 1631.6. The call is to be allocated "upon receiving . . . Selective Service Form 200 from the Director of Selective Service." Regulation 1631.6. Since the request came from the local board, not the Director of Selective Service, the allocation could not have been made at the time the National Director sent the form 200. That had already occurred. The reason given by the local board was very irregular. The statute requires the allocations to be made on the basis of the number of men available for induction with credit given for the number of men from the local board or subdivision in the Armed Forces on the date for determining the quotas. 50 App. U.S.C. §455 (b). The letter does not mention any facts about the number of its registrants in the Armed Forces or the number of men available. The Board gives as its reason for

increasing the call: "He, [McGee] will be 26 years of age on August 10, 1969." In other words, the board believed that the defendant might be too old to be drafted if it waited for the next regular draft call. The board's reason for drafting the defendant early was blatantly lawless. Nothing in the record suggests that the call was illegal before it was increased, but even if the local board had suggested that the call was too small because more of its registrants were available or out of the Armed Forces, than it earlier reported it would still be up to the State Director to compare that Local board's figures with the reports from other boards and then decide whether he should reallocate the State's call among all the boards in the State. The local board had no way to lawfully determine that its draft call should be bigger. When the local board on its own initiative was asking the State Headquarters to draft more than the local board's share of the State draft call, it was doing so without any authority in the regulations.

The cases which the Court of Appeals cited in its opinion, *United States* v. *Baker*, 416 F.2d 202 (9th Cir. 1969) and *Yates* v. *United States*, 404 F.2d 462 (1st Cir. 1969) deal with the order in which men are called after the size of the call has been fixed. Here we are not objecting to the order in which the call was filled, but the fact that the call was not big enough to include Petitioner without disregarding the proper allocations of the National draft call to the local board which had already occurred. This is a case where the draft board was asking to draft more than its quota not a case where the quota was filled by taking men in the wrong order. It is further clear, from the record that the increase of the quotas was prejudicial to McGee.

Petitioner's case was before the Selective Service Appeal Board until May 27, 1969, when he was notified that

he was placed in class I-A. So long as his appeal was pending, the regulations prohibited his induction. Regulation 1626.41. It was on that very day that the local board asked for permission to increase their call and draft the petitioner. (Government Exhibit 52). Since we may presume that the local board complied with the regulation requiring them to issue induction orders to fill their call, "when a call is received", Regulation 1631.7, we must presume that those induction orders had already been issued and the local board had already issued enough induction orders to fill its call.

The regulations permit the induction of only one kind of registrant without an induction call. Section 1631.8 of the regulations provides that a member of the reserves who fails to serve satisfactorily may be inducted into the regular Armed Forces without a draft call. No other registrant may be inducted in the absence of a draft call. In other words, the local board must wait for the next regular draft call to draft any registrant except a delinquent reservist. The drafting of the petitioner in the absence of a regular call was as lawless as drafting a registrant who was entitled to exemption. The regulations simply do not permit the induction of a registrant when the local board's quota has already been filled.

Inclusion in or exclusion from a particular draft call may determine whether or not a registrant will serve at all.[1] If the local board had waited for its next regular

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[1] The importance of being included in one call rather than the next was dramatically demonstrated on February 8, 1972 when Selective Service announced:

"Selective Service had some good news today for some 126,000 young men who faced possible induction in February or March. Selective Service Director Curtis W. Tarr today instructed local draft boards

monthly call, petitioner might have presented a prima facie case for a 1-Y deferment and obliged the board to reopen his classification (See Government Exhibit 31; Army Regulation AR 40-501 paragraph 2-11*b*; *Mulloy* v. *United States,* 398 U.S. 410, 416 (1970)). Even though the petitioner was approaching his 26th birthday and could be ranked in the order of call ahead of younger men (32 C.F.R. §1631.7) he would not be included in any call if he had presented a prima facie case for deferment.

The board's issuance of Petitioner's induction order (Government Exhibit 55) the day after he was mailed notification of the denial of his hardship claim materially changed his rights to seek a deferment from his board. *Elhert* v. *United States,* 402 U.S. 99 (1971). Such a change in his right to reopening before the next regular call was itself prejudicial. Since the board deprived him of his rights we will never know what use he would have made of them if they had been given. If the board had waited until the next regular call, petitioner might have become too old to be inducted. The local board expressed this concern in their letter. They said he will be 26 years of age on August 10, 1969. By asking the State Director for per-

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[1] (Continued)

to cancel outstanding induction orders for more than 11,000 young men and to place them — as well as all of the 115,000 members of the 1972 extended priority selection group — into the less vulnerable second priority selection group — thus ending the possibility of their receiving induction orders, except in the event of a national emergency." Press Release 72-3, Office of Public Information, National Headquarters, Selective Service System.

If any of those 126,000 men had been arbitrarily included in the December 1971 call they would have been inducted rather than assigned to the second priority group.

mission to add him to the June call, the board was asking the State Director to draft him before their next regular draft call and was accelerating McGee's induction.

The very peculiar and perhaps malicious request contained in Government Exhibit 52 rebuts the presumption of regularity and the Government has failed to prove beyond a reasonable doubt that the quota for local board 79 was proper. The Government failed to prove beyond a reasonable doubt, that defendant, McGee, was ordered for induction no earlier than the next regularly scheduled call.

Unfortunately, the conduct of the petitioner's board was not unique. A chance examination of the public records of Illinois Local Board No. 101 by petitioner's lawyer revealed that on December 4, 1970, the Illinois State Director of Selective Service issued call #246 *A* for one registrant and specified the registrant's *name* on the notice of call: Urs Buehler. The records show that Mr. Buehler holds Selective Service No. 11-101-44-962. The petitioner's board is not the only board which lawlessly disregards the Statute and Regulations governing quotas and calls. The semi-annual report of the Director of Selective Service (July 1, 1970 - December 31, 1970) P. 47 showed that the quotas and draft calls from 1949 through the first half of 1971 totaled 4,602,873 and that 4,750,210 men or 147,337 more than quotas were actually inducted. While in some years Selective Service has not met its quota, the most recent figures available to counsel show that in the first half of 1971, Selective Service inducted 6,179 more men than the department of defense called. The figures themselves suggest the importance of having the Court decide petitioner's case and the questions concerning quotas and calls which have not, but which should be decided by this Court. Most men who are the victims of lawless increases in induction

calls would receive no notice of action by the board seeking the increase and would be in the Armed Forces without knowing of the lawless conduct. Government Exhibit 52 was sent by the draft board to the State Director, not the petitioner. The letter was only discovered after the petitioner challenged his induction order and after the government produced petitioner's file during litigation. This court has not, but should, decide the questions raised when a Selective Service board, without justification in the statute or regulation, singled out the petitioner, added him to the draft call and accelerated his induction.

CONCLUSION

For the reasons stated in this petition it is respectfully prayed that this Court issue its Writ of Certiorari to review the judgment of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 18670 SEPTEMBER TERM, 1971 SEPTEMBER SESSION, 1971

UNITED STATES OF AMERICA, *Plaintiff-Appellee*, v. ALFRED EDWARD McGEE, *Defendant-Appellant*.	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 70-CR-98 BERNARD M. DECKER, *Judge*.

JANUARY 11, 1972

Before SWYGERT, *Chief Judge*, KILEY and STEVENS, *Circuit Judges*.

KILEY, *Circuit Judge*. Defendant McGee was convicted by a jury of wilfully and knowingly refusing to submit to induction into the Armed Forces[1] by refusing "to cooperate in induction processing." He has appealed. We affirm.

McGee was classified I-A by his local board and ordered to report for induction January 29, 1969. He reported as ordered, signed various documents,[2] but refused to take the symbolic step forward. On February 10, 1969 the Illinois State Director instructed the local board to cancel the outstanding January 29 induction order and recommended reopening of McGee's classification.

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[1] 50 U.S.C. App. § 462.

[2] Statement of Personal History; Acknowledgment of Service Obligation; Armed Forces Security Questionnaire; Report of Medical History and Work Sheet for DA Form 41.

On March 11, 1969 the local board again classified McGee I-A. He requested an appeal, and after conferring with an appeal agent on April 14 asked for, *inter alia*, a III-A "extreme hardship" classification.[2]

In support of his hardship claim McGee filed a Dependency Questionnaire, among other forms, claiming as his dependent a married sister, deserted by her husband, who, with her four small children, then lived in the family home with her parents, a sister and defendant McGee. At the board's request McGee filed copies of his own, and his father's, 1968 income tax returns. He claimed, in the Questionnaire, that he contributed half of his sister's annual income. The board on May 14 wrote McGee that it had "reviewed all evidence" and unanimously decided against reopening, that his I-A classification continued in effect, and that his file was "being sent to the appeal board."

The appeal board on May 21 unanimously confirmed McGee's I-A classification. On May 27 the board ordered him to report for induction. The next day that order was superseded by another order directing him to report for induction June 11, 1969. He reported, but failed to complete and sign the standard processing documents. His indictment—that he "refuse[d] to submit . . . in that he refused to cooperate in induction processing"—his trial and conviction followed.

I.

McGee contends that the information supplied to the board in support of his III-A claim required reopening

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[2] 32 C.F.R. § 1622.30 (b) (2) (1969) provides in pertinent part:

> In Class III—A shall be placed any registrant whose induction into the armed forces would result in extreme hardship (1) to his wife, divorced wife, child, parent, grandparent, brother, or sister who is dependent upon him for support, or (2) to a person under 18 years of age or a person of any age who is physically or mentally handicapped whose support the registrant has assumed in good faith: . . .

of his I-A classification. The question is therefore whether his request presented a sufficient prima facie claim for the hardship reclassification to compel a reopening of his I-A classification. *Mulloy* v. *United States*, 398 U.S. 410, 416 (1970).

A registrant states a valid prima facie case for a III-A classification if he makes non-frivolous allegations of facts that have not been previously considered by his board, and which, if true, would establish that his induction would result in "extreme hardship" to his dependents, unless the truth of those facts was conclusively refuted by other reliable information in the file. *Mulloy*, at 416; 32 C.F.R. §1622.30(b)(2).

No case cited or found sets explicit standards in determining whether a prima facie claim for a III-A "extreme hardship" deferment has been presented to a local board. The statute authorizes the President to prescribe regulations for the deferment of registrants with "dependents upon them for support."[4] The only standard in the regulation is "extreme hardship."[5]

Each case has its own facts and the "facts" presented control the decision. Nevertheless, in determining whether a valid III-A prima facie extreme hardship claim is alleged, the following considerations are in order: the degree of need of the claimed dependent; the nature of the need; the extent of the registrant's contribution to the need; the lack of a viable alternative source of contribution to the dependent's support; and the degree of distress resulting to dependent from loss of registrant's contribution.[6]

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[4] 50 U.S.C. App. §456(h)(2).

[5] See note 3, *supra*.

[6] See *United States ex rel. Kukla* v. *Gillen*, No. 71-1085 (decided October 19, 1971, 7th Cir.); *Landau* v. *Allen*, 424 F.2d 668, 671 (6th Cir. 1970); *United States ex rel. Luster* v. *McBee*, 422 F.2d 562, 569 (7th Cir. 1970); *Howze* v. *United States*, 409 F.2d 27 (9th Cir. 1969); *Rheingans* v. *Clark*, 314 F.Supp. 1398, 1401-02 (N.D. Cal. 1968); *Breda* v. *Allen*, 311 F. Supp. 599, 603 (N.D. Ohio 1969).

Here the Dependency Questionnaire and other supporting documents submitted by McGee stated that in 1968 he and his father contributed the greater part of their earnings to support McGee's dependent sister who had been abandoned by her husband. However, the supporting documents also show that McGee himself contributed $300 of his annual $4,724 salary to his sister's annual income of $600; that neither McGee nor his father had claimed the dependent on their 1968 income tax returns; that the sister and her four children had lived with McGee and his parents at their home during the preceding nine months; and that the sister was presently looking for an apartment.

Taken as true, the relevant substance of the "new facts" is that McGee contributed to his sister a little more than 7% of his net salary—after income taxes—of $4,067. His only expense, viewed most favorably to him, was $600 per year rent. It is not clear whether his sister's income of $600 was from contributions of McGee and his father. However, there is nothing to show why the dependent could not have increased her income from part-time work while her mother cared for the children. Nor is there anything to show that she needed an apartment or who would pay the rent if she leased one. Finally, McGee himself noted that if drafted he would continue his support to his sister. We hold that the facts as alleged by McGee, and taken as true, did not entitle him to a III-A hardship exemption.

II.

On May 27, 1969, about two weeks after the board's refusal to reopen, the local board wrote the State Director for authority to increase the "June 11th induction call" to include McGee who would be "26 years of age on August 10th, 1969." McGee contends that the board's request to increase the induction call for that month conflicted with the regulations[2] which required that "delinquents" and "volunteers" be called first. He argues that this shifted the burden to the government to justify including him in the call.

McGee concedes that ordinarily a presumption of regularity establishes proper order of the call, but relies on *United States* v. *Baker*, 416 F.2d 202 (9th Cir. 1969), to sustain his contention that including him in the call because of his age violated the mandate of 32 C.F.R. § 1631.7. He argues that the district court erred in presuming the call was regular instead of requiring proof as it should have done.

Baker does not support McGee's argument, since there the registrant proved by "direct evidence" that six named registrants should have been called before him and that had they been ordered to report he would not have been called. Here McGee presented no evidence at the trial directly or indirectly that would remove from him the burden of proving the order of the call was irregular. The district court did not err in invoking the presumption of regularity that the call was proper. *Yates* v. *United States*, 404 F.2d 462, 466 (1st Cir. 1969).

Nor do we find merit in McGee's contention that the court prevented him from proving irregularity of the call by denying motions for a continuance and a reopening of proofs. McGee's motions were made after both sides had rested. McGee's attorney did not touch on the proof—subject of the motion—either in cross-examination of the supervisor of draft records at McGee's local board, or in direct examination of the supervisor as a defense witness, even though she was the proper person from whom to elicit the relevant testimony. See *Yates*, at 466. There was no abuse of discretion in the rulings under these circumstances. *Id.* And there is nothing in McGee's brief or in

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[7] 32 C.F.R. §1631.7(b) (1969) provides in pertinent part:

> . . . Such registrants shall be selected and ordered to report for induction in the following order:
>
> (1) Delinquents who have attained the age of 19 years in the order of their dates of birth with the oldest being selected first.
>
> (2) Volunteers who have not attained the age of 26 years in the sequence in which they have volunteered for induction.
>
> (3) Registrants in the designated age group: . . .

the transcript pages referred to which persuades us that McGee's counsel was unduly restricted in cross-examination of witnesses in attempting to make the proof.

Finally on this point, we find no abuse of discretion in the court's limiting cross-examination to the scope of direct testimony of the government's witnesses. *United States* v. *Bender*, 218 F.2d 869, 873 (7th Cir. 1955).

III.

The local board on May 27, 1969 wrote McGee to report for induction June 11. On May 28 the board wrote him that the order of May 27 was invalid and it enclosed an SSS Form 252 "which is valid and in effect," ordering him to report June 11. These orders, McGee argues, together with the original order to report on January 28, 1969, caused him to be confused, so that he was incapable of the wilful conduct charged in the indictment.

However, McGee reported on the day appointed, presumably unconfused by the two unambiguous orders. The government has made clear to us that the board wrote the May 27 letter under a misapprehension that the January order had not been cancelled, but that the next day corrected the mistake by sending the formal SSS order to report. The decision in *United States* v. *Bowen*, 414 F.2d 1268 (3rd Cir. 1969), is of no aid to McGee. There the court *sua sponte* noted the confusing nature of the board's letter which could well have made Bowen "uncertain about the continuing validity of the notice of induction." *Id.* at 1270. There is no merit in McGee's argument that he was "confused."

IV.

McGee next argues that when he appeared at the reporting station June 11, he was never asked to step forward, and that this deprived him of the "last clear chance" to change his mind and submit. At the induction center, however, McGee would not sign papers which were part of the standard process preliminary to induction and which he was requested by the induction officer to fill out.

He had the duty to comply with the request. *See Billings* v. *Truesdell*, 321 U.S. 542, 557 (1944); 32 C.F.R. § 1632.14 (b).[8]

McGee's order to report carried more than a duty to appear. He also had the duty to go through the "process which constitutes induction." *United States* v. *Collura*, 139 F.2d 345 (2nd Cir. 1943). It was no excuse for McGee's failure that he had signed the processing papers when he reported earlier in January, 1969, and was then told that he would not have to sign any more papers. He was in no position to impose his own terms—that he wanted "to eliminate paperwork"—as his trial testimony indicates. *Id.* at 346. And he had no option to reply upon his earlier signature of papers. That earlier order was cancelled and the processing nullified. His file justifiably notes that he was "uncooperative" in not signing the papers. That he was told to go home upon his failure to sign the papers did not deprive him of any right to an opportunity to take the symbolic step forward.

The decision in *Chernekoff* v. *United States*, 219 F.2d 721 (9th Cir. 1955), is inapposite. There the registrant had presumably completed the processing but had then stated he would not submit. There was in *Chernekoff* no lack of cooperation in the standard preliminary processing, whereas here the basis of the indictment was failure to cooperate in induction processing. And it is highly improbable that McGee would have taken the step had he been given

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[8] 32 C.F.R. § 1632.14(b) reads in pertinent part as follows:

> Upon reporting for induction, it shall be the duty of the registrant . . . (3) to appear at the place where his induction will be accomplished, (4) *to obey the orders of the representatives of the Armed Forces while at the place where his induction will be accomplished*, (5) *to submit to induction*. . . . (Emphasis added)

50 U.S.C. § 462(a) imposes a criminal penalty on a selective service registrant for failure "to perform any duty required of him under or in the execution" of the Act or "rules or regulations made pursuant thereto."

what he claims as his "last clear chance." He had signed papers in January but refused to take the step. He would not sign the papers in June, but now contends he might have done so if given the chance. Yet after leaving the induction office he says that he went to the local board "to straighten out" his problems. This indicates that he never accepted the obligation to cooperate with the induction process.

We conclude that by being uncooperative in failing to sign the papers preliminary to the taking of the step, McGee refused to submit to induction as charged in the indictment. *See United States* v. *Mansarage*, 178 F.2d 812, 818 (7th Cir. 1949).

V.

McGee also claims that he was not given warning of the consequences of his failure to cooperate as required by army regulation, and that he was prejudiced as a result. A showing of prejudice is needed to validate that claim *Briggs* v. *United States*, 397 F.2d 370, 373 (9th Cir. 1968). In Briggs there was denial of physical inspection at the induction and the court thought the denial to be prejudicial. *Id.* at 374. We are not persuaded that McGee was not warned and we presume he was, but if he was not we cannot find any prejudice was suffered by him. He admitted that he was read the warning "twice" in January.

VI

We treat as frivolous McGee's contention that there was no proof that he committed a crime because there is no evidence he was ordered to do anything he refused to do. And we find without merit his claim that the Delinquent List—included in his file, with other documents pertaining to his SSS history—stating, as to him, under column Remarks, "Uncooperative," is prejudicial hearsay evidence introduced at his trial. He cannot show prejudice because there is ample other evidence, including his own testimony, that he was uncooperative.

Finally, we reject McGee's claim of error in a given instruction which he argues is defective for assuming that he refused to complete forms. That was the basis of the charge that he refused to submit to induction and there is evidence in the record justifying the instruction.

AFFIRMED.

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

JANUARY 11, 1972

Hon. LUTHER M. SWYGERT, *Chief Judge*
Hon. ROGER J. KILEY, *Circuit Judge*
Hon. JOHN PAUL STEVENS, *Circuit Judge*

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* *v.* No. 18670 ALFRED EDWARD McGEE, *Defendant-Appellant*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division and was argued by counsel.

On consideration whereof; it is ordered and adjudged by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby affirmed, in accordance with the opinion of this court filed this day.

PART 1631—QUOTAS AND CALLS

1631.1 Quotas and Credits.—Quotas of men to be inducted for training and service in the Armed Forces shall be determined for each State, Territory, possession, and the District of Columbia, and for the subdivisions thereof on the basis of the number of registrants therein who have been found to be available for service in the Armed Forces. In fixing such quotas, credits shall be given for residents of such subdivisions who are found to be serving on active duty in the Armed Forces on the date fixed for determining such quotas. Until the actual numbers necessary for determining the quotas are known, the quotas may be based on estimates, and subsequent adjustments thereof shall be made when such actual numbers are known.

1631.2 Determination of Quotas, Credits, and Debits.—(a) The Director of Selective Service shall determine the quotas, credits, and debits for the nation and for each State. Each State Director of Selective Service shall be required periodically to report the total number of registrants in the State and the total number of registrants therein by classifications on Report of Availability and Summary of Classification (SSS Form 116). Each State Director of Selective Service shall also periodically report the number of registrants inducted from his State on State Monthly Report of Deliveries, Inductions and Examinations (SSS Form 262).

(b) The Armed Forces will furnish to each State Director of Selective Service a Notification of Entry into Active Military Service (DD Form 53) for each person, whether a registrant or not, who is a resident of that State and who enters upon active duty in the Armed Forces other than by induction through a local board.

(c) When a person on active duty in the Armed Forces is transferred to an inactive duty status or is discharged, the appropriate State Director of Selective Service will receive from the Armed Forces a report of transfer or discharge for each such person.

(d) Each State Director of Selective Service shall report periodically to the Director of Selective Service on State Monthly Report of Deliveries, Inductions and Examinations (SSS Form 262) the number of Notifications of Entry into Active Military Service (DD Form 53) and the number of reports of transfer or discharge properly forwarded to him for crediting and debiting purposes in his State. Each State Director of Selective Service shall also compute and allocate the debits and credits for each local board in his State.

1631.3 Determination of Local Board Quotas, Credits, and Debits.—The State Director of Selective Service for each State shall determine the quotas, credits, and debits for each local board in his State. He shall from time to time call upon each local board to report the number of registrants in the local board, the number by classifications, and the number who have been found acceptable for service in the Armed Forces.

1631.4 Calls by the Secretary of Defense.—(a) The Secretary of Defense may from time to time place with the Director of Selective Service a call or requisition for a specified number of men required for induction into the Armed Forces. The Secretary of Defense may also from time to time place with the Director of Selective Service a call or requisition for a specified number of men in any medical, dental, or allied specialist category required for induction into the Armed Forces.

(b) When future needs of the Armed Forces may require it, the Secretary of Defense also may from time to time place with the Director of Selective Service a call or requisition for a specified number of men, for induction into the Armed Forces, designating the age group or groups from which such men shall be selected.

(c) All registrants born within any calendar year shall constitute an age group within the meeting of this section.

(d) The Secretary of Defense shall present such calls or requisition to the Director of Selective Service not less than

60 days prior to the period during which the delivery and induction of such men are to be accomplished.

1631.5 Calls by the Director of Selective Service.—(a) The Director of Selective Service shall, upon receipt of a call or requisition from the Secretary of Defense for a specified number of men to be inducted into the Armed Forces, allocate such call or requisition among the several States.

(b) Upon receipt of a call or requisition from the Secretary of Defense for a specified number of men in a medical, dental, or allied specialist category to be inducted into the Armed Forces, the Director of Selective Service shall allocate such call or requisition among the several States.

(c) The Director of Selective Service shall issue a Notice of Call on State (SSS Form 200) to the State Director of Selective Service of each State concerned (1) for the number of men allocated to each State, or (2) for the number of men in the medical, dental, or allied specialist category allocated to each State. The Director of Selective Service shall send two copies of each such Notice of Call on State (SSS Form 200) to the Secretary of Defense.

1631.6 Calls by State Director of Selective Service.—The State Director of Selective Service, upon receiving a Notice of Call on State (SSS Form 200) from the Director of Selective Service shall (a) allocate to the local boards concerned within his State (1) the number of men which his State is called upon to furnish for service in the Armed Forces, or (2) the number of men in the medical, dental, or allied specialist category which his State is called upon to furnish for service in the Armed Forces, and (b) issue to each local board concerned a Notice of Call on Local Board (SSS Form 201) directing the local board to select and deliver for induction (1) the number of men allocated to the local board, or (2) the number of men in the medical, dental, or allied specialist category allocated to the local board. The State Director of Selective Service shall send a copy of each Notice of Call on Local Board (SSS Form 201) to the commanding officer

of the joint examining and induction station to which the selected men are directed to report for induction.

1631.7 Action by Local Board Upon Receipt of Notice of Call.—(a) When a call is placed without designation of age group or groups each local board, upon receiving a Notice of Call on Local Board (SSS Form No. 201) from the State Director of Selective Service (1) for a specified number of men to be delivered for induction, or (2) for a specified number of men in a medical, dental, or allied specialist category to be delivered for induction, shall select and order to report for induction the number of men required to fill the call from among its registrants who have been classified in Class I-A and Class I-A-O and have been found acceptable for service in the Armed Forces and to whom the local board has mailed a Statement of Acceptability (DD Form No. 62) at least 21 days before the date fixed for induction: *Provided*, That a registrant classified in Class I-A or Class I-A-O who is a delinquent may be selected and ordered to report for induction to fill an induction call notwithstanding the fact that he has not been found acceptable for service in the Armed Forces and has not been mailed a Statement of Acceptability (DD Form No. 62): *And provided further*, That a registrant classified in Class I-A or Class I-A-O who has volunteered for induction may, be selected and ordered to report for induction notwithstanding the fact that he has not been found acceptable for service in the Armed Forces and regardless of whether or not a Statement of Acceptability (DD Form No. 62) has been mailed to him. Such registrants, including those in a medical, dental, or allied specialist category, shall be selected and ordered to report for induction in the following order:

(1) Delinquents who have attained the age of 19 years in the order of their dates of birth with the oldest being selected first.

(2) Volunteers who have not attained the age of 26 years in the sequence in which they have volunteered for induction.

(3) Nonvolunteers who have attained the age of 19 years and have not attained the age of 26 years and who do not have a wife with whom they maintain a bona fide family relationship in their homes, in the order of their dates of birth with the oldest being selected first.

(4) Nonvolunteers who have attained the age of 19 years and have not attained the age of 26 years and who have a wife with whom they maintained a bona fide family relationship in their homes, in the order of their dates of birth with the oldest being selected first.

(5) Nonvolunteers who have attained the age of 26 years in the order of their dates of birth with the youngest being selected first.

(6) Nonvolunteeers who have attained the age of 18 years and 6 months and who have not attained the age of 19 years in the order of their dates of birth with the oldest being selected first.

In selecting registrants in the order of their dates of birth, if two or more registrants have the same date of birth they shall, as among themselves, be selected in alphabetical order.

(b) When a call is placed with designation of age group or groups, each local board, upon receiving a Notice of Call on Local Board (SSS Form 201) from the State Director of Selective Service for a specified number of men to be delivered for induction, shall select and order to report for induction the number of men required to fill the call from among its registrants who have been classified in Class I-A and Class I-A-O and who have been found acceptable for service in the Armed Forces and to whom the local board has mailed a Statement of Acceptability (DD Form 62) at least 21 days before the date fixed for induction: *Provided*, That a registrant classified in Class I-A or Class I-A-O who is a delinquent may be selected and ordered to report for induction to fill an induction call notwithstanding the fact that he has not been found acceptable

for service in the Armed Forces and has not been mailed a Statement of Acceptability (DD Form 62); *And provided further,* That a registrant classified in Class I-A or Class I-A-O who has volunteered for induction may be selected and ordered to report for induction notwithstanding the fact that he has not been found acceptable for service in the Armed Forces and regardless of whether a Statement of Acceptability (DD Form 62) has been mailed to him. Such registrants shall be selected and ordered to report for induction in the following order:

(1) Delinquents who have attained the age of 19 years in the order of their dates of birth with the oldest being selected first.

(2) Volunteers who have not attained the age of 26 years in the sequence in which they have volunteered for induction.

(3) Registrants in the designated age group; and registrants who previously have been deferred in Class I-S-C after attaining the age of 19 years, or who have requested and have been granted a deferment in Class II-S after the enactment of the Military Selective Service Act of 1967, and who are no longer so deferred, shall be considered as being within the age group called regardless of their actual age. These registrants shall be integrated and called according to the month and day of their birth, the oldest first. Registrants who have been deferred in Class I-S-C or Class II-S and have been integrated with a prime age group under the provisions of this paragraph shall, for the purposes of selection and call, thereafter be considered a member of such age group.

(c) Whenever the number of postponements of induction materially reduces the number of men the local board actually can deliver in response to a call, the local board shall issue orders to report for induction to such numbers of additional men as may be necessary to meet the call, taking into account the number of men to be delivered following the expiration of postponements previously granted.

1631.8 Registrants Who Shall Be Inducted Without Calls.—(a) Notwithstanding any other provision of the regulations in this chapter, any registrant enlisted or appointed after October 4, 1961, in the Ready Reserve of any reserve component of the Armed Forces (other than under section 511 (b) of title 10, United States Code), the Army National Guard, or the Air National Guard, prior to attaining the age of 26 years, or any registrant enlisted or appointed in the Army National Guard or the Air National Guard prior to attaining the age of 18 years and 6 months and prior to September 3, 1963, and deferred under the provisions of section 6(c) (2) (A) of the Universal Military Training and Service Act, as amended, which were in effect prior to September 3, 1963, or any registrant enlisted in the Ready Reserve of any reserve component of the Armed Forces prior to attaining the age of 18 years and 6 months and prior to August 1, 1963, and deferred under section 262 of the Armed Forces Reserve Act of 1952, as amended, who fails to serve satisfactorily during his obligated period of service as a member of such Ready Reserve or National Guard or the Ready Reserve of another reserve component or the National Guard of which he becomes a member as certified by the respective armed force, shall be ordered to report for induction by the local board regardless of the class in which he is classified and without changing his classification. Any registrant who is ordered to report for induction under this paragraph shall be forwarded for induction at the next time the local board is forwarding other registrants for induction or at any prior time when special arrangements have been made with the induction station, without any calls being made for the delivery of such registrants. Whenever the local board desires to deliver such a registrant specially, it shall request the State Director of Selective Service to make the special arrangements for the time and place at which the registrant may be delivered for induction.

(c) Notwithstanding any other provision of law, any forwarded for induction under paragraph (a) of this section shall be inducted into the armed force of which the reserve component in which the registrant is a member is a part.

"(c) Notwithstanding any other provision of law, any registrant who has failed or refused to report for induction shall continue to remain liable for induction and when available shall be immediately inducted.

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No. 71-1224

In the Supreme Court of the United States

OCTOBER TERM, 1971

ALFRED EDWARD McGEE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1971

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ALFRED EDWARD MCGEE, PETITIONER

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted of willful refusal to submit to induction into the Armed Forces, in violation of 50 U.S.C. App. 462(a). He was sentenced to three years' imprisonment. The court of appeals affirmed (Pet. App. 1a).

Petitioner registered with his local board on August 14, 1961 (SSF 1),[1] and, except for a brief interval not here relevant, he held a student (II-S) deferment from January 14, 1964, until May 28, 1968 (*ibid.*). He was then classified I-A, and was ordered to report for induction on January 28, 1969

[1] "SSF" references are to petitioner's Selective Service file, a copy of which is on file with the Clerk of this Court.

(SSF 25). Petitioner reported, but refused to submit to induction (SSF 29).

Following his refusal, petitioner's file was forwarded to the State Director, and on February 10, 1969, the State Director returned the file to the local board with directions that the outstanding induction order be cancelled and petitioner's I–A classification be reopened for the purpose of curing certain procedural irregularities (SSF 34).[2] The local board reopened petitioner's classification, and, on March 11, 1969, he was again classified I–A (SSF 36).

Upon receipt of his Notice of Classification, petitioner notified his local board on April 10, 1969, that he wished to appeal (SSF 38). He also requested and received an appointment with a government appeal agent (SSF 39, 40). Following this appointment on April 14, 1969, petitioner notified his local board that he wished to claim a hardship (III–A) deferment (SSF 41); he also submitted information to the board in support of his claim (SSF 43, 44). On May 14, 1969, he was notified that the local board had considered the deferment request and had determined that his claim did not warrant a reopening of his classification (SSF 48). Petitioner's file was then transmitted to the State Appeal Board (SSF 51). On May 21, 1969, that board voted unanimously to classify petitioner I–A (SSF 63).

Thereafter, on May 27, 1969, the local board requested and received from the State Director authority

[2] None of these procedural irregularities is at issue in the present petition.

to increase its June 11, 1968, induction call so as to include petitioner (SSF 32). It then mailed petitioner an order to report for induction on June 11, 1968 (SSF 33). Petitioner reported as ordered but refused induction (SSF 37); his indictment, trial and conviction followed.

Petitioner's sole contention here is that the addition of his name to the June 11 induction call was improper. While we agree with petitioner that the procedure followed here should not be encouraged, we do not believe on the facts of this case that he has demonstrated a basis for invalidating his order of induction.

1. At the time that petitioner had exhausted his administrative appeal rights and been finally classified I-A by the State Appeal Board, he was only two and a half months shy of his 26th birthday. He had thus succeeded in deferring his obligation to the military for almost eight years. Until he reached the age of 26, he was, under the regulation then in effect (32 C.F.R. (1967 ed.) 1631.7(a)),[3] subject to call in the third highest priority group, behind delinquents and volunteers under the age of 26.[4] Thereafter, he became a member of the fifth highest priority group (32 C.F.R. (1967 ed.) 1631.7(a)(5)), thus virtually eliminating any possibility that he might be called.

Petitioner has offered no evidence indicating that the local board acted improperly in requesting permission from the State Director to add petitioner to

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[3] The regulation is set forth in full at Pet. App. 13a–14a.

[4] Since petitioner was unmarried, he was not in the fourth priority group. See 32 C.F.R. (1967 ed.) 1631.7(a)(4).

the induction call before his 26th birthday. Given his age and his clear eligibility for induction at the time of the May 1969 request, the likelihood is that he was not taken out of turn. It is thus not surprising that his counsel declined to probe the order of call issue at trial either on cross-examination of the government witnesses or on direct examination of witnesses called for the defense.[1] As the court below correctly points out (Pet. App. 5a), petitioner had "the burden of proving the order of the call was irregular." Having failed to make any effort to meet that burden, it was entirely proper in the present circumstances for the courts below to invoke the presumption of regularity with respect to the order of call (see *Yates* v. *United States*, 404 F. 2d 462, 466 (C.A. 1)).

2. Nor do we find any rational basis for concluding that the State Director exceeded his authority in granting the local board's request. This is not a case like *Gutknecht* v. *United States*, 396 U.S. 295, for example, where a registrant is being ordered to induction for essentially punitive purposes. Nor do we have here a situation where the order of induction is in disregard of a deferment or exemption to which petitioner was plainly entitled. Compare *Oestereich* v. *Selective Service Board*, 393 U.S. 233. Petitioner had

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[1] Petitioner called as a defense witness the only government official competent to testify on the issue of order of call—the Supervisor of the Chicago South Office of the Selective Service System—but asked no questions on that point and made no reference to the May 1969 request by the local board (Tr. 86). The issue was first raised in support of a motion for judgment of acquittal (Tr. 189–191) after both sides had rested (Tr. 165).

been placed in Class 1–A by the State Appeal Board; he was at the time in question under the age of 26. Thus, the State Director's action in permitting petitioner's name to be added to the June call was not in excess of his authority.

Petitioner speculates that by adding him to the June 11 order of call, the State Director may have exceeded the allotted quota of the number of men that could have been drafted in the state in that month. He has offered no evidence in support of that supposition, however. Nor do we believe that there is much basis for such an assumption. Once the National Director has established the state quota (see 32 C.F.R. (1967 ed.) 1631.5, reproduced at Pet. App. 12a), the matter of allocating to the local boards within the state the number of men to be called rests solely in the discretion of the State Director (see 32 C.F.R. (1967 ed.) 1631.6, reproduced at Pet. App. 12a–13a). And, if one or more of the local boards fails to fill its Notice of Call (see 32 C.F.R. (1967 ed.) 1631.7(a), reproduced at Pet. App. 13a–14a), it is plainly permissible for the State Director, as was apparently done in this case, to increase the allotment of one of the other local boards which had already been filled. Since here the increase involved induction of but one more individual, it appears highly unlikely that the State Director's authorization resulted in any irregularity. Moreover, in view of the absence of any evidence indicating otherwise, the presumption is in favor of regularity. See *Yates* v. *United States, supra*, 404 F. 2d at 466.

3. Finally, petitioner's claim that he was prejudiced by the challenged procedure because it deprived

him of an opportunity to make additional claims for deferment or exemption is not well taken. He has already had almost eight years to formulate such claims and present them to his local board. Even now, he does not assert that he is entitled to deferred or exempt status; he merely states that, given more time, he "might have presented a prima facie case for a 1-Y [medical] deferment" (Pet. 13). But, in July 1968 and again in January 1969, petitioner had been found medically acceptable for induction (SSF 59A, 59E).

4. We also point out that, subsequent to petitioner's failure to submit to induction in the present case, the Selective Service regulation relating to order of call was substantially revised to provide for the existing random selection lottery system (Executive Order 11563, October 3, 1970; 32 C.F.R. (1971 ed.) 1631.7). Under that system, there is a different priority grouping for purposes of determining the order of induction, one that is geared essentially to the "random sequence number established by random selection procedures" (see 32 C.F.R. (1971 ed.) 1631.7(b)(2)(3)(4)), rather than to the age of the registrant. Accordingly, it is unlikely that the issue raised in the present petition will reoccur in future cases.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

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Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

REPLY TO MEMORANDUM FOR THE UNITED STATES

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1) The Government asserts that adding the petitioner to the June 11th induction call was not improper. This Court condemned accelerated inductions in *Gutknecht* v. *United States,* 396 U.S. 295. But for the local board's letter (Government Exhibit 52) the petitioner would not have been included in the June 11th induction call. Without the extraordinary request singling out the petitioner, the petitioner in all likelihood would have been included

in the call to be delivered in July or the call to be delivered in August. By its action, the board and the State Director accelerated the petitioner's induction by at least one month. The issue here is not was the petitioner taken out of turn but was he taken earlier than he should have been taken. The Government itself by its Exhibit 52 proved that the petitioner was called early.

2) The Government seeks to excuse the State Director's conduct in adding the petitioner to the local board's call by asserting "the matter of allocating to the local boards within the State the number of men to be called rest solely in the discretion of the State Director . . ." (Memorandum in Opposition page 5). The Solicitor misstates the law, the State Director is not free to ignore the statute: 50 App. U.S.C. Section 455(b). The statute requires:

> "Quotas of men to be inducted for training and service under this title shall be determined for each state . . . *and for subdivisions thereof*, on the basis of the actual number of men in the several States . . . and for the subdivisions thereof, who are liable for . . . service but were not deferred . . .except that credits shall be given in fixing such quotas for residents of such subdivisions who are in the Armed Forces on the date fixed for determining such quotas." 50 App. U.S.C. Section 455(b)

In other words, the State Director in allocating the quota among the local boards in his State is bound by the statutory formula which requires him to allocate the draft call among the local boards on the basis of the number of men registered with each local board liable for service but not deferred and the number of men from that board in the Armed Forces. Just as the statute requires the

National Director to allocate the draft call for the Nation among the States on the basis of the statutory formula so too, the statute compels the State Director to allocate the call for his State among the local boards on the basis of the statutory formula. The State Director may not in his sole discretion ignore the statutory formula and increase a single board's fair share of the draft call for the purpose of drafting a single named individual.

Nothing in the record suggests that the call was illegal before it was increased, but even if the local board had suggested a basis for recalculating the quota (i.e. that the call was too small because more of its registrants were available or out of the Armed Forces than it earlier reported) it would still be up to the State Director to compare the local board's figures with the reports from other local boards in the State and then decide whether he should reallocate the State's call among all of the boards in the State. The local board had no way to lawfully determine that its draft call should be bigger when the local board on its own initiative was asking the State Headquarters to draft more than the local board's share of the State's draft call, it was doing so without any authority in the regulations or the statute. The Board and the State Director did not in exhibit 52 even allude to the statutory requirements for allocating quotas among local boards. Their purpose was not the impartial administration of the law but something far more sinister.

It is plain from the record in this case that Illinois Local Board No. 79 wanted to get the petitioner. This Court and the due process clause of the Fifth Amendment to the Constitution of the United States of America should protect an individual when Government officials transform

a purportedly impartial system of selection into one that permits the officials to carry out personal or unexpressed vendettas.

3) The petitioner's procedural rights to seek new deferments were materially changed when the induction order was issued. The Government contends that the petitioner was not prejudiced because the record does not show that the petitioner would have been deferred if he had been allowed to exercise the procedural rights which terminated when the induction order was issued. The Government should not be permitted to deprive a person of a procedural right and then argue that the failure to exercise the right which the Government withheld justifies the withholding of the right.

4) The Government argues that the issues presented by the petition are less important because the order in which men are called by Selective Service is now governed by a lottery. The lottery governs the order in which men are called. Here we are not objecting the order in which the call was filled, but the fact that the call was not big enough to include the petitioner without disregarding the proper allocations of the National draft call to the local board. The statute governing the allocations of quotas is the same now as it was when the petitioner was ordered to report for induction. Section 5(b) of the Military Selective Service Act, 50 App. U.S.C. Section 455(b). No regulations have been promulgated by the President to change the statutory system of allocating quotas. The Solicitor General on page 3 of his Memorandum concedes:

> ". . . We agree with petitioner that the procedure followed here should not be encouraged . . ."

The petitioner knows of no better way for this Court to discourage the practice described in this record than to grant the petition for writ of certiorari and reverse the judgment of conviction.

Respectfully submitted,

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